IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-160, 78-161, 78-162

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, R.G.P. INCORPORATED, DARRELL L., HAROLD, HAROLD M. and LUEA SORENSON, HAROLD JACKSON, OTIS PETERSON, TRAVELERS INSURANCE COMPANY, STATE OF IOWA, and STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

Petitioners,

v.

OMAHA INDIAN TRIBE and UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

JOHN C. CHRISTIE, JR.
CHARLES T. MARTIN
STEPHEN J. LANDES
BELL, BOYD, LLOYD, HADDAD & BURNS
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

Page

STATUTES:

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-160, 78-161, 78-162

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, R.G.P. INCORPORATED, DARRELL L., HAROLD, HAROLD M. and LUEA SORENSON, HAROLD JACKSON, OTIS PETERSON, TRAVELERS INSURANCE COMPANY, STATE OF IOWA, and STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

Petitioners,

v.

OMAHA INDIAN TRIBE and UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The memorandum opinion of the District Court, together with its findings of fact and conclusions of law, is reported at 433 F. Supp. 57, 67 (N.D. Iowa 1977) and the opinion of the Eighth Circuit Court of Appeals is reported at 575 F.2d 620 (8th Cir. 1978).

STATUTE INVOLVED

25 U.S.C. § 194 provides:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

QUESTIONS PRESENTED

1. Whether 25 U.S.C. § 194, which places the burden of proof upon a "white person" in litigation over property rights when "an Indian" is a party on one side and a "white person" is on the other, applies when the United States as trustee and an Indian tribe are on one side and various landowners, including natural persons, corporate entities and a state, are on the other.

2. Whether 25 U.S.C. § 194 is unconstitutional on its face because it assigns the burden of proof upon a racial basis in violation of the Fifth Amendment.

INTEREST OF THE AMICUS CURIAE AND REASONS FOR GRANTING THE WRIT [1]

There is presently pending in numerous federal courts extensive Indian claims litigation for the recovery of land and for trespass or other damages for the wrongful possession of the land.[2] These cases seek the return

[1] Attorneys for all of the parties herein have given written consent to the filing of this amicus brief. Copies of the consents have been submitted to the Court with this brief.

[2] A partial list of cases includes: *United States* v. *Atlantic Richfield*, No. A-75-215 Civ. (D. Alaska), *appeal docketed*, No. 77-3972 (9th Cir. Sept. 6, 1977); *United States* v. *State of Maine*, Civ. No. 1966-ND, 1969-ND (D. Me.); *Western Pequot Tribe of Indians* v. *Holdridge Enterprises, Inc.*, Civ. No. H-76-193 (D. Conn.);

of vast amounts of real property from present owners and the recovery of billions of dollars in damages upon the basis that past acquisitions of Indian tribal land by the defendants or their predecessors in interest were invalid and of no effect.[3] This litigation has been instituted in virtually every instance by either the United States, as trustee, or by the Indian tribes themselves, or both.

The American Land Title Association (ALTA) is the national trade association of the land title industry. Its

Schaghticoke Tribe of Indians v. *Kent School Corporation*, Civ. Action No. H-75-125 (D. Conn.); *Mashpee Tribe* v. *New Seabury Corp.*, Civ. No. 76-3190 (D. Mass.), *appeal docketed*, Nos. 78-1272-73-74 (1st Cir. May 1, 3 and 8, 1978); *Chitimacha Tribe of Louisiana* v. *Harry L. Laws Co., Inc.*, Civ. No. 770772-L (W.D. La.); *Oneida Indian Nation of New York State* v. *County of Oneida*, 70-CV-35 (N.D.N.Y.); *Oneida Indian Nation of New York* v. *The New York State Thruway Authority*, 78-CV-104 (N.D.N.Y.); *Seminole Tribe of Indians of Florida* v. *State of Florida*, No. 78-6116-CIV (S.D. Fla.); *Sappier* v. *State of Maine*, Civ. No. 78-72-ND (D. Me.). In addition to these and numerous other pending cases, the United States, through the Department of the Interior, has indicated its intention to recommend the institution of a number of additional actions on behalf of Indian tribes. For example, on July 1, 1977 the Department announced its recommendation that the Justice Department on behalf of St. Regis, Mohawk, Cayuga and Oneida Nation Tribes sue those persons claiming an adverse interest in approximately 272,500 acres of land in upper New York State. Department of Interior News Release dated July 1, 1977. On August 30, 1977 the Department similarly recommended litigation on behalf of the Catawba Indian Tribe for approximately 140,000 acres of land in the Rock Hill, North Carolina area. *Washington Post*, August 31, 1977, at p. A6. In fact, in connection with legislation to extend the statute of limitations provided in 28 U.S.C. § 2415 for commencing Indian claims for monetary damages by the United States, as trustee, the Department indicated that the number of potential claims under review "could amount to well over 1,000." S. Rep. No. 95-236, 95th Cong., 1st Sess. 2 (1977).

[3] Among the more substantial of the claims for land and damages asserted in the pending cases are *United States* v. *State of Maine*, *supra*, approximately 12.5 million acres and an estimated $25 billion in trespass damages; *Chitimacha Tribe of Louisiana* v. *Harry L. Laws Co., Inc.*, *supra*, 7,000 acres of land and $100,000,000 in damages; *Oneida Nation* v. *The New York State Thruway Authority*, *supra*, approximately 6 million acres and damages exceeding $12 million.

approximately 2,200 members include land title insurers, their agents, abstractors and associate members. The principal function of the land title industry is to facilitate the safe, certain and efficient transfer of title to real estate in both residential and commercial transactions.

The statute at issue herein, 25 U.S.C. § 194, purporting to govern the allocation of the burden of proof in Indian claim litigation "about the right of property" has never been applied in any reported case prior to the opinion of the Eighth Circuit herein since the time of its original enactment some one hundred and fifty-six years ago.[4] The belated resuscitation of this statute is of great concern to the ALTA and to all persons relying upon the marketability of land titles. The Eighth Circuit's sweeping application of Section 194 would suddenly erase in this and other similar cases accepted allocations of the burden of proof in actions affecting the titles to real property which have been developed over the years in courts throughout the country. That development of the law has contributed substantially to stable and predictable land transfers which are a necessary prerequisite to the informed judgment of attorneys, abstractors, title insurers, government agencies at various levels and others who must pass daily upon the state of title to real property.

Inasmuch as the events complained of in Indian land claims litigation occurred in the distant past, in many cases hundreds of years ago, the outcome of the litigation often will rest upon the application of the burden

[4] The opinion itself notes that two previous cases have cited Section 194 but that ". . . neither case expounds upon the effect this section should be given." 575 F.2d at 631 n.19. *United States* v. *Sands*, 94 F.2d 156 (10th Cir. 1938); *Felix* v. *Patrick*, 36 F. 457 (C.C.D. Neb. 1888), *aff'd*, 145 U.S. 317 (1892).

of proof, as it clearly did herein.[5] Prompt resolution of the proper construction of Section 194 will provide constructive guidance to those many trial and appellate courts presently confronted with this litigation, thereby expediting its conclusion by avoiding unnecessary appeals and re-trials.

The need for this Court's present review of the Eighth Circuit's opinion is particularly compelling inasmuch as the mere pendency of Indian land claim litigation creates uncertainty over the state of the titles to the land at issue. In certain places in which this litigation is occurring, that uncertainty has caused the sale of homes and other real estate transactions to come to a virtual halt, has made mortgage loans difficult or impossible to obtain and has threatened the tax base and future development of municipalities, all of which has had a substantial economic and emotional impact.[6] If the Eighth Circuit's erroneous decision is allowed to stand, pending Indian land claim litigation will be prolonged and new claims will be encouraged. As a result, more and more people may be affected by similar economic and emotional problems.

[5] Of course, the application of the burden of proof is frequently critical in any case, as this Court has observed:

> Where the burden of proof lies on a given issue is . . . rarely without consequence and frequently may be dispositive to the outcome of the litigation . . . .

Lavine v. *Milne*, 424 U.S. 577, 585 (1976).

[6] 123 Cong. Rec. S. 16239 (daily ed. October 4, 1977) (remarks of Senator Kennedy); 123 Cong. Rec. S. 5655-57 (daily ed. April 6, 1977) (remarks of Senator Brooke); 123 Cong. Rec. S. 2305-06 (daily ed. March 1, 1977) (remarks of Senator Hathaway); 123 Cong. Rec. S. 3211-12 (daily ed. March 1, 1977) (remarks of Senator Muskie); 123 Cong. Rec. H. 1533-34 (daily ed. March 1, 1977) (remarks of Rep. Cohen).

STATEMENT

This brief is submitted in support of petitions for certiorari from a final judgment remanding this case to the District Court with directions to enter judgment quieting title in the lands in issue in the United States, as trustee, and in the Omaha Indian Tribe. The relevant facts of this case are set forth in the opinions of the Court of Appeals and the District Court and are summarized as follows.

On May 19, 1975, the United States, suing as trustee for the Omaha Indian Tribe, brought suit seeking a judgment quieting title in the United States, as trustee, respecting 2,900 acres of land. On May 20, 1975, the very next day, the Omaha Tribe itself filed suit to restrain named landowners from interfering with its peaceful possession and use of the same 2,900 acres and, subsequently, brought another suit to quiet title.[7] The defendants were several landowners and tenants, a corporate landowner, a corporate mortgagee, the State of Iowa and the State Conservation Commission. It was undisputed that from at least the 1940's until the time of the litigation the defendants and their predecessors in title had occupied, cleared and cultivated the land in dispute.[8]

---

[7] The tribal complaint to quiet title (No. 75-4067) in fact encompassed 11,500 acres, including the 2,900 acres which was the subject of the action instituted by the United States on its behalf. (No. 75-4024). In consolidating all of the cases for trial, the District Court severed and stayed all claims to land beyond the 2,900 acres at issue in common. 433 F. Supp. at 69.

[8] The District Court found the land at issue to be "now a valuable and productive tract of farm ground, as evidenced by the purchase of 2180 acres by defendant Wilson in 1972 by Warranty Deed for a consideration valued at $1,685,000, approximately 1780 acres of which is within [the 2,900 acres immediately in dispute]." *Id.*

Following a lengthy trial, the District Court reviewed the evidence and, upon extensive findings of fact, entered judgment against the United States, as trustee, and the Omaha Tribe, quieting title in the defendants. 433 F. Supp. at 68-88, 92. The Court determined that the Missouri River had changed by reason of the erosion of the tribal land and accretion to the defendants' riparian land to which it was presently attached. 433 F.Supp. at 68.

The Court of Appeals reversed, finding that Section 194 controlled and that "the defendants have failed to overcome the presumptive right of possession and title in the Tribe . . . ." 575 F.2d at 623, 631-33. As a result, the Court held the defendants "failed in sustaining their burden of proof under § 194." 575 F.2d at 651.

SUMMARY OF ARGUMENT

25 U.S.C. § 194 purports to place the burden of proof upon the "white person" in all trials about the right of property in which "an Indian" is a party on one side and "a white person" is on the other, once the Indian establishes a "presumption of title in himself from the fact of previous possession or ownership." The predecessor of this section of federal Indian legislation was first enacted into law in 1822 and enacted in its present form in 1834.[9] Since that time, the statute has remained with-

---

[9] As noted by the Eighth Circuit, 25 U.S.C. § 194 is derived intact from Section 22 of the 1834 Indian Nonintercourse Act, Act of June 30, 1834, 4 Stat. 729, 733. 575 F.2d at 632 n.20. It was based upon a similar provision in the Nonintercourse Act enacted in 1822, Act of May 6, 1822, § 4, 3 Stat. 682-83 which read:

> That, in all trials about the right of property, in which Indians shall be party on one side and white persons on the other, the burden of proof shall rest upon the white person, in every case in which the Indian shall make out a presumption of title in himself from the fact of previous possession and ownership.

out application in any reported case until the instant litigation.

The statute on its face is an anachronism. The scope of this anachronism was erroneously extended by the Eighth Circuit in applying the statute in litigation in which the United States, as trustee, and an Indian tribe are parties to one side and various landowners, including corporations and a state are on the other. Neither the language of Section 194 itself nor of the 1834 Indian Nonintercourse Act, of which it was a part, supports the Eighth Circuit. Its erroneous construction encourages Indian land claim litigation and, by compounding error and uncertainty, impedes the marketability of land titles.

ARGUMENT

I. Section 194 Does Not Apply To Indian Land Claims In Which The United States Or An Indian Tribe Are A Party Or Parties On One Side Or In Which A Corporate Entity Or State Are A Party Or Parties On The Other.

A. *By Its Terms, Section 194 Only Applies When "An Indian" Is A Party.*

The only party plaintiffs in these consolidated cases are the United States, as trustee, and the Omaha Indian Tribe, each asserting a tribal interest in the property at issue.[10] Section 194 by its terms applies only when "an Indian" is on one side and a "white person" is on the

[10] The District Court found that the United States "derives its interest in this litigation as a Trustee for the Omaha Indian Tribe and their reservation lands reserved to the Tribe pursuant to the Treaty of 1854." 433 F. Supp. at 68.

With respect to the nature of the tribal plaintiff, the District Court found the Omaha Indian Tribe to be "a duly organized body corporate, established pursuant to its Constitution and Bylaws having been approved by the Secretary of the Interior as provided by law." *Id.*

other. Plainly this is not that case because neither the United States, as trustee, nor the Omaha Indian Tribe is "an Indian".

The Eighth Circuit construed the statute as if it were to provide that in "trials about the right of property in which an Indian *or an Indian tribe* may be a party on one side . . . the burden of proof shall rest upon the white person, whenever the Indian *or an Indian tribe* shall make out a presumption of title in himself *or itself* from the fact of previous possession or ownership." However, plainly such an interpretation goes beyond the words actually chosen by Congress in enacting Section 194. As this Court has recently observed in another context, "[l]ogic and precedent dictate that the starting point in every case involving construction of a statute is the language itself." *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 98 S. Ct. 2370, 2375 (1978).

Moreover, in examining the language of the Indian Nonintercourse Act of 1834, it is apparent that Congress did not consider the phrase "an Indian" interchangeable with the term "Indian tribe". While certain sections, such as Section 22 (the predecessor of Section 194), applied to "an Indian", other sections applied more broadly to an "Indian Nation" or "Indian Tribe". Thus, for example, Section 12 prohibited conveyances from "any Indian nation or tribe of Indians" unless the same shall be made by treaty.[11] In fact, when the protection pro-

[11] From 1796 until 1834 the Nonintercourse Act prohibited a conveyance of lands from "any Indian, or nation, or tribe of Indians" unless the same be made by treaty. Act of May 19, 1796, § 12, 1 Stat. 472; Act of March 30, 1802, § 12, 2 Stat. 143. In 1834, at the same time Section 22 was changed to its present form, this prohibition was amended to apply more narrowly to such a conveyance from "any Indian nation or tribe of Indians". Act of June 30, 1834, § 12, 4 Stat. 729, 730. At that time, Congress appears to have con-

vided by certain sections of the 1834 Nonintercourse Act was designed to apply *both* to individual Indians and to Indian tribes, Congress so provided. Thus, Section 9 prohibited the driving of livestock upon land belonging to "any Indian *or* Indian tribe". (emphasis supplied). This Congressional decision to use different terms within the same Act as well as within some of the same sections of that Act clearly suggests a deliberate choice of words. The term "an Indian" clearly meant an individual, distinct from "an Indian tribe".[12]

There is no present need to expand the scope of Section 194 beyond that contemplated by Congress in 1822 and 1834. As the instant case demonstrates, tribal claims to land are undertaken by the federal government or by the tribes themselves or both with significant resources and competent legal talent.

---

ceived of Section 12 as protecting tribal property rights while Section 22 was concerned with a "right of property" owned by an Indian individually.

[12] Significant differences exist between the rights, privileges and interests of an individual Indian on the one hand and an Indian tribe on the other. For example, although individual Indians had the capacity to sue and be sued even before they became citizens, there was substantial authority for many years that tribes could litigate only where authorized to do so by statute. *See* FELIX S. COHEN, FEDERAL INDIAN LAW (1942 ed.), pp. 162, 283-85 and *Johnson* v. *Long Island RR. Co.*, 162 N.Y. 462, 56 N.E. 992 (1900). Because of the distinction between individual Indians and their tribes, courts have held that a tribe's authority to sue extends only to claims involving tribal interests and not to the legal or equitable claims of tribal members. *See, e.g., Sioux Tribe of Indians* v. *United States*, 89 Ct. Cl. 31 (1939). Conversely, groups of individual Indians do not have the same interest in tribal land as the tribe and, thus, cannot assert a tribal claim. *See, e.g., Minnesota Chippewa Tribe* v. *United States*, 315 F.2d 906 (Ct. Cl. 1963), and *see* Cohen, *supra*, p. 288.

B. *By Its Terms, Section 194 Only Applies When "A White Person" Is A Party.*

The defendants having various interests in the 2,900 disputed acres were several natural persons,[13] two corporations, the State of Iowa and the State Conservation Commission. In applying Section 194, which requires by its terms that "a white person" be on the other side in a property dispute with an Indian, the Eighth Circuit Court of Appeals concluded that "white person", as used in the statute, includes corporate entities, a state and a state agency.[14] This conclusion directly contradicts prior judicial interpretation of the term and the intention of Congress at the time Section 194 was enacted, as well as the clear language of the statute.

This Court has previously interpreted the term "white person" as used in the Indian Nonintercourse Act of 1834 to denote explicitly a "white person" and no others. *United States* v. *Perryman*, 100 U.S. 235 (1879). The Court there indicated that this was the meaning the term had at the time of its original enactment, and that the term therefore could not be construed to mean no more than "not an Indian". Section 16 of the 1834 Indian Nonintercourse Act provided that whenever a "white person" commits a crime within Indian country and is unable to pay to the Indian the value of any of the property taken, the United States shall make the payment. A Negro was convicted of stealing cattle from an Indian and the Indian instituted an action against the United States for the value of the stolen cattle. In find-

---

[13] No record evidence was offered with respect to the racial characteristics of the natural person defendants.

[14] In this regard, the Eighth Circuit simply found that "the *non-Indian* claimants were required to assume the burden of proof to show that the Indians no longer had lawful title . . . ." 575 F.2d at 633. (emphasis added). The Court reached this conclusion without any discussion of the meaning of the term "white person".

ing the United States to have no liability pursuant to Section 16, this Court stated:

> The term "white person", in the Revised Statutes, must be given the same meaning it had in the original act of 1834. Congress had nowhere manifested an intention of using it in a different sense.

100 U.S. at 236.

There is no reason for this Court to construe the term "white person" as found in Section 22 of the 1834 Nonintercourse Act to have a different meaning than the same term as used in Section 16 of the same Act. Moreover, in 1822 when the predecessor of Section 194 was first enacted and for many years thereafter the term "person" had not been construed to include a corporation for purposes of constitutional and statutory analysis. *Monell* v. *Department of Social Services of the City of New York*, 98 S. Ct. 2018 (1978).[15] It is also apparent that in 1822 and 1834, Congress would not have contemplated a trial about a right of property by an Indian against a state inasmuch as the doctrine of sovereign immunity shielded the states from such suits. *Hans* v. *Louisiana*, 134 U.S. 1 (1890).

An examination of other sections of the 1834 Nonintercourse Act indicates that when Congress determined to extend the scope of various provisions of the Act beyond "a white person", it did so in more expansive language. Section 4 provided that "any person other than an Indian" who attempted to reside in Indian country as a trader without license would suffer a penalty and forfeit goods. Sections 7 and 8 imposed a forfeiture of certain monies upon "any person other than an Indian" for trading a gun, trap or other article commonly used

[15] Although at a later date "person" was construed to include a corporation, it is plain that the term "white person" cannot be similarly construed.

in hunting or hunting in Indian country. Section 9 prohibited "any person" from driving cattle upon land "belonging to an Indian or Indian tribe".

These provisions again indicate deliberate Congressional attention to the language utilized and rebut any argument that "white person" should be construed to mean "any person other than an Indian". There is no basis to expand "white person" to mean all "non-Indians", including a state and corporate entities.

II. Section 194 Is Unconstitutional On Its Face Because It Assigns The Burden Of Proof Upon A Racial Basis.

The terms of Section 194 make it unnecessary for this Court to reach any Constitutional decision in this case. As discussed above, the statute applies only when "an Indian" is on one side and a "white person" is on another. This is not that case because here the United States and an Indian tribe are on one side and various natural persons, whose race is not of record, corporations and a state are on the other side.

However, the very language of Section 194 should have caused the Eighth Circuit to subject the statute to rigorous Constitutional analysis. Such an analysis would have led to the necessary conclusion that the automatic assignment of the burden of proof upon a racial basis in Indian land claim cases violates the Fifth Amendment to the Federal Constitution.

It has long been the view of the Court that "racial and ethnic classifications . . . are subject to stringent examination . . . . are inherently suspect and thus call for the most exacting judicial examination." *Regents of the University of California* v. *Bakke*, 98 S. Ct. 2733, 2749 (1978) (Powell, J.). In addition, "strict judicial scrutiny" must be applied when a statute "impinges upon a fundamental right explicitly or implicitly protected by

the Constitution." *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 17 (1973). Both because the subject statute contains an explicit racial classification and because it directly affects the right to equal protection and due process in civil litigation, the strict scrutiny test should have been applied by the Eighth Circuit. *See Shelly* v. *Kraemer*, 334 U.S. 1, 22 (1948).

When an individual is classified on the basis of racial or ethnic background and that classification has an effect on a personal right, the individual "is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Bakke*, *supra*, at 2753. At the time of its initial adoption in 1822, Section 194 was an apparent response to the individual Indian's inability to effectively make use of the judicial system to protect his right to property. Today, it cannot be seriously argued that the specific deprivation of rights that Section 194 sought to remedy still exists, notwithstanding other deprivations of rights that Indians may currently suffer and which may justify different remedial action.

Since the adoption of Section 194 fundamental changes have occurred with respect to the Indian's legal status as well as with respect to his ability to participate in the litigation process. See pp. 9-10, *supra; McClanahan* v. *State Tax Commissioner of Arizona*, 411 U.S. 164, 172-73 (1973). Moreover, Section 194 has been rendered moot and superfluous by subsequent legislation directed towards similar deprivations but premised upon a universal basis and not limited to any particular group. The Civil Rights Act of 1866, 42 U.S.C. §§ 1981-1982 (1970),[16] was a watershed in protecting the rights of *all*

[16] Title 42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Title 42 U.S.C. § 1982 provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

persons engaged in the litigation process and land transactions. The Civil Rights Act goes beyond Section 194 in its extension of these rights not just to racial or ethnic minorities but to " 'all persons' including white persons." *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287 (1976).

Rather than undertake an analysis of whether Section 194 is a presently valid method of securing a compelling governmental interest, the court placed simplistic reliance upon this Court's statement in *Morton* v. *Mancari*, 417 U.S. 535, 554-55 (1974) that Indians may be "single(d) out . . . for particular and special treatment." However, in *Mancari*, the Court specifically pointed out that the legal status of the Bureau of Indian Affairs was *sui generis* and that the preference granted to Indians was a function of the political nature of the Bureau and the quasi-sovereign status of the Indian tribes. *Id.* at 554; *Bakke*, *supra*, at 2756 n.42. Those cases where the Court recognized that a special status is present with regard to certain aspects of Indian self-rule and quasi-sovereignty do not apply in the equal protection area.[17] *Mancari* provides no shortcut to the rigorous

[17] Any claim by the plaintiffs herein that Indians have a special status in the equal protection area appears to contradict language in Justice Powell's opinion in *Bakke*, where he says:

> It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.

98 S. Ct. at 2751.

equal protection analysis that Section 194 demands and the Eighth Circuit erred by avoiding such an analysis.

In addition to the fact that Section 194 does not serve a compelling governmental interest in protecting Indian rights, it also places an impermissible burden on "white persons" who find themselves engaged in litigation with an Indian. The automatic assignment of the burden of proof on a purely racial basis impinges on the fundamental right to due process guaranteed by the Constitution and should have been subjected to strict scrutiny on that basis as well as by the court below.

This Court has repeatedly held that the right to engage in the litigation process is a fundamental right. In *Chambers* v. *Baltimore and Ohio R. Co.*, 207 U.S. 142, 148 (1907) the Court stated:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.

In a more recent opinion, the Court emphasized that "the right to a meaningful opportunity to be heard . . . must be protected against denial by particular laws that operate to jeopardize it for particular individuals." *Boddie* v. *Connecticut*, 401 U.S. 371, 379-80 (1971).

The presumption contained in Section 194 is not consistent with recent decisions of this Court. In *Reed* v. *Reed*, 404 U.S. 71 (1971), the Court struck down a provision of the Idaho probate code that gave preference to men over women for appointment as administrators of decedents' estates upon a determination that gender may not be used as a burden-shifting devise in the distribution of economic benefits. *See also, Craig* v. *Boren*, 429 U.S. 190 (1976). Here the characteristic of race is an equally

unacceptable means of allocating burdens that are essential in securing economic benefits. Failure of the court below to examine the presumptions inherent in Section 194 is yet another ground for reversing the Eighth Circuit.[18]

Finally, it should also be emphasized that this is not a situation where the affected party has another outlet to exercise his due process right. The opportunity to defend the land claim is singular, cf. *Grant Timber & Manufacturing Co.* v. *Gray*, 236 U.S. 133 (1915), and exists only within the venue of the court. The fact that this due process right cannot be exercised elsewhere should have been considered by the Eighth Circuit before it allowed this right to be so heavily encumbered. *Boddie, supra*, at 375-76; cf. *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977).

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

JOHN C. CHRISTIE, JR.
CHARLES T. MARTIN
STEPHEN J. LANDES
BELL, BOYD, LLOYD, HADDAD & BURNS
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
202/466-6300

Attorneys for the American Land Title Association

Dated: August 18, 1978

[18] Section 194 should also fail on the basis that it is simply not rational to allocate the burden of proof on "white persons." See *Western & Atlantic R. Co.* v. *Henderson*, 279 U.S. 639 (1929).